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Applicants:	Paul T. Van Gompel	Docket No.:	19,577
Serial No.:	10/750,402	T.C./A.U.:	3761
Confirmation No.:	8997	Examiner:	Chapman, Ginger T
Filed:	December 31, 2003	Date:	October 18, 2007
For:	DUAL-LAYERED DISPOSABLE GARMENT		

Commissioner for Patents
P.O. Box 1450
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Appeal Brief (11 pages)

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Brief on Appeal to the Board of Patent Appeals and Interferences

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Commissioner For Patents
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Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37 Appellants respectfully submit this Brief in support of their Appeal of Examiner Chapman's **Final Rejection** of claims 34, 38, 39, 43-45, and 48-51 which was mailed on May 22, 2007.

On August 21, 2007 Appellants, pursuant to 37 C.F.R. 41.31 mailed a timely Notice of Appeal which was received in the USPTO on August 21, 2007. Thus, the time period for filing this Brief ends on October 21, 2007.

Real Party in Interest

The real party in Interest in the present Appeal is Kimberly-Clark Worldwide, Inc., the assignee, as evidenced by the assignment set forth at Reel 014864, Frame 0634.

Related Appeals and Interferences

U.S. Patent Application number 10/750,253 (Examiner Craig, confirmation no. 1718) is a commonly owned application having common subject matter and is currently on appeal and thus may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. Specifically, a notice of appeal was filed on July 23, 2007 for U.S. Patent Application number 10/750,253. An appeal brief was filed on September 20, 2007 for this same case. A notice of non-compliant appeal brief was sent on October 1, 2007. Appellants intend to correct the appeal brief on or before November 1, 2007.

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To the knowledge of appellants, appellants' legal representative, or assignee, there are no other known related appeals, judicial proceedings, or interferences which may directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status of Claims

Claims 34, 38, 39, 43-45 and 48-51 are currently pending in the application and stand finally rejected under 35 U.S.C. § 103(a). Claims 1-33, 35-37, 40-42, and 46-47 are canceled. The rejection of claims 34, 38, 39, 43-45 and 48-51 is appealed. A copy of the appealed claims appears in the Claims Appendix of this Brief.

Status of Amendments

No amendments were filed after the Final Office Action mailed May 22, 2007.

A provisional terminal disclaimer was filed on June 14, 2007 with regard to copending U.S. patent application 10/749,761. The terminal disclaimer was approved on June 22, 2007 according to the records in PAIR.

Summary of Claimed Subject Matter

The following summary correlates claim elements to specific embodiments described in the application specification, but does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

Independent claim 34 is directed towards a disposable absorbent garment 100 as representatively illustrated at Figure 1. The disposable absorbent garment 100 includes an elastic outer layer 80 (see e.g., page 11, line 14 through page 12, line 17) having an outer layer perimeter 85. The disposable absorbent 100 also includes an elastic inner layer 20 (see e.g., Fig. 1 and page 11, line 14 through page 13, line 2). The elastic inner layer 20 has an elastic inner layer perimeter 25. The elastic inner layer 20 defines an opening 90 located in an internal position to the elastic inner layer perimeter 25. (See e.g., Fig. 1 and page 13, line 3 through page 14, line 5). The elastic inner layer perimeter 25 is bonded to the outer layer perimeter 85 with a plurality of ultrasonic, adhesive or thermal bonds. The disposable

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absorbent garment also includes an absorbent assembly 150 positioned between the outer layer 80 and the elastic inner layer 20. The absorbent assembly 150 includes a topsheet layer (page 19, lines 16-30), a core layer (page 19, line 31 through page 21, line 4), and a barrier layer (page 21, lines 5-20).

Dependent claim 51 includes all the limitations of independent claim 34 but further requires that the absorbent assembly 150 be attached to the outer layer 80 along a lateral centerline of the absorbent assembly. (See e.g., page 21, lines 21-30).

Grounds of Rejection To Be Reviewed on Appeal

Ground 1

Claims 34, 38, 39, 43-45 and 48-51 stand rejected under 35 U.S.C. § 103(a) over U.S. Patent No. 6,193,701 to Van Gompel et al. (hereinafter "*Van Gompel*") in view of U.S. Patent Publication No. 2002/0072726 A1 to Mishima et al. (hereinafter "*Mishima*").

Ground 2

Claims 34, 38-39, 43-45 and 48-51 are provisionally rejected under the judicially created doctrine of obvious-type double patenting over claims 1-46 of copending Application No. 10/749,761.

Argument

Ground 1

It is respectfully submitted that Claims 34, 38, 39, 43-45 and 48-51 are patentable over U.S. Patent No. 6,193,701 to Van Gompel; in view of U.S. Patent Publication No. 2002/0072726 A1 to Mishima. Accordingly, the Examiner's rejection under 35 U.S.C. § 103(a) should be reversed.

In order to establish a *prima facie* case of obviousness, three basic criteria must be met: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to

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combine reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP §2143. The application of the "teaching, suggestion, or motivation" (TSM) test is not "rigid." However, the analysis supporting a rejection under 35 U.S.C. § 103(a) should be made explicit and should "identify a reason" that would have prompted a person of ordinary skill in the relevant field to combine the [prior art] elements" in the manner claimed. *KSR Int'l. Co., v. Teleflex, Inc.*, 550 U.S. ____ (2007) (slip opinion at ¶¶ (3)(4) (emphasis added)).

Claim 34

The proposed modification of *Van Gompel* in view of *Mishima* fails to teach or suggest all the claim limitations. Applicants' claim 34 is reproduced below for reference.

34. A disposable absorbent garment, the disposable absorbent garment comprising:
- an elastic outer layer having an outer layer perimeter;
 - an elastic inner layer, wherein the elastic inner layer has an elastic inner layer perimeter and wherein the elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter; wherein the elastic inner layer perimeter is bonded to the outer layer perimeter with a plurality of ultrasonic, adhesive or thermal bonds; and
 - an absorbent assembly positioned between the outer layer and the elastic inner layer, wherein the absorbent assembly includes a topsheet layer, a core layer and a barrier layer.

Claim 34 requires the combination of these 5 components:

1. An elastic inner layer with an opening
2. A topsheet layer of an absorbent assembly
3. A core layer of the absorbent assembly
4. A barrier layer of the absorbent assembly
5. An elastic outer layer

Fig. 2 of *Van Gompel* is reproduced below and shows that only four of the five components are taught.

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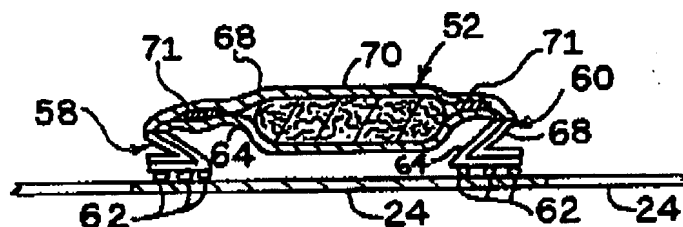


FIG. 2

Specifically, *Van Gompel* teaches:

1. A liquid permeable bodyside liner 68 of an absorbent structure 52
2. An absorbent core 70 of the absorbent structure 52
3. An impermeable backsheet 64 of the absorbent structure 52
4. An outercover 24

Therefore, it is clear that *Van Gompel* does not teach the combination of the five elements required by Applicants' claim 34. This is contrary to the Examiner's assertion on page 2 of the Office Action wherein the Examiner states that *Van Gompel* teaches both an elastic inner layer and a topsheet layer (as part of the absorbent assembly). Appellants respectfully disagree. *Van Gompel* discloses only a liquid permeable bodyside liner 68 as illustrated above in Fig. 2. This single element, the bodyside liner 68, does not satisfy both the elastic inner layer and the topsheet layer because these are two distinct claim elements.

Building on this assertion, the Examiner acknowledges that "Van Gompel does not expressly disclose the elastic inner layer defining an opening." (Office Action at page 3). Thus, the Examiner proposes forming the elastic inner layer of Van Gompel defining an opening as taught by *Mishima*. Even assuming, *arguendo*, that this proposed modification were proper, the resultant product would still lack both an elastic inner layer and a topsheet layer as required by the claims.

Furthermore, *Van Gompel* teaches against such a modification. Specifically, *Van Gompel* states at column 10, lines 4-6 that "Bodyside liner 68 is suitably utilized to help isolate, from the wearer's skin, the liquids held in absorbent core 70." (emphasis added). To modify the bodyside liner 68 of *Van Gompel* with an opening would frustrate the stated purpose of the

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bodyside liner, that is, to isolate the skin from the core. Therefore, one skilled in the art would not be motivated to form an opening in the bodyside liner of *Van Gompel* as suggested.

Therefore, claim 34 is patentably distinct and non-obvious over the proposed modification of *Van Gompel* in view of *Mishima* for at least these reasons and the rejection of this claim should be reversed. Claims 38-39, 43-45, and 48-51 depend from claim 34 and are patentably distinct for at least the same reason and the rejection of these claims should also be reversed.

Claim 51

Dependent claim 51 further requires the absorbent assembly to be attached to the outer layer along a lateral centerline of the absorbent assembly. The Examiner states that "as best depicted in Figure 2, Van Gompel et al disclose the absorbent assembly (52) is attached (62) to outer layer (24) along a lateral centerline of absorbent assembly (52)." (Office Action at page 4). Appellants respectfully disagree. *Van Gompel* teaches and illustrates the exact opposite.

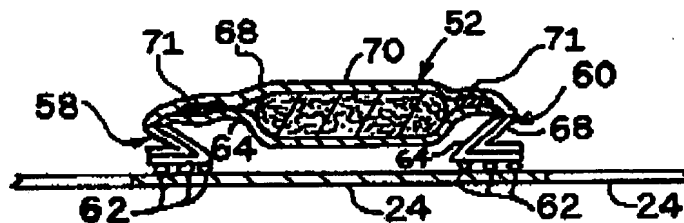


FIG. 2

To wit, referring again to Fig. 2 of *Van Gompel*, reproduced above, it is clear that connection points (62) are on the outer portions of the absorbent assembly, not along the lateral centerline. In fact, the entire centerline and the area surrounding the lateral centerline, as illustrated, is devoid of points of attachment.

The specification further highlights this point stating that "Extendible attachment elements 54, 56, 58, 60 comprise outwardly extending sections of the backsheet 64 and bodyside liner 68 extending outwardly at opposing sides of the front and rear of absorbent structure 52 as shown

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in FIGS. 1-2." (column 8, line 66 through column 9, line 18; emphasis added).

Appellants respectfully submit that claim 51 is patentably distinct over the proposed modification of *Van Gompel* in view of *Mishima* for at least this additional reason and the rejection of this claim should be reversed.

Ground 2

A provisional terminal disclaimer was filed on June 14, 2007 with regard to copending U.S. patent application 10/749,761. The terminal disclaimer was approved on June 22, 2007 according to the records in PAIR. Thus, the provisional rejection of claims 34, 38-39, 43-45 and 48-51, under the judicially created doctrine of obvious-type double patenting over claims 1-46 of copending Application No. 10/749,761, should be reversed.

Conclusion

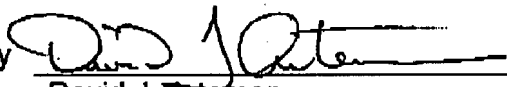
For the reasons set forth above, it is respectfully submitted that the Examiner's rejections under 35 U.S.C. §103 should be reversed.

Please charge the \$500.00 fee, pursuant to 37 C.F.R. 1.17 (c), for filing this Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutorial fees which are due may also be charged to deposit account number 11-0875.

The undersigned may be reached at: 920-721-3016

Respectfully submitted,

PAUL T. VAN GOMPEL ET AL.

By 

David J. Arterman
Registration No.: 44,512

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Claims Appendix

The claims on appeal are:

34. A disposable absorbent garment, the disposable absorbent garment comprising:
an elastic outer layer having an outer layer perimeter;
an elastic inner layer, wherein the elastic inner layer has an elastic inner layer perimeter
and wherein the elastic inner layer defines an opening located in an internal position to the
elastic inner layer perimeter; wherein the elastic inner layer perimeter is bonded to the outer
layer perimeter with a plurality of ultrasonic, adhesive or thermal bonds; and
an absorbent assembly positioned between the outer layer and the elastic inner layer,
wherein the absorbent assembly includes a topsheet layer, a core layer and a barrier layer.
38. The disposable absorbent garment of claim 34, wherein the outer layer is liquid
impermeable.
39. The disposable absorbent garment of claim 34, wherein the outer layer is liquid
permeable.
43. The disposable absorbent garment of claim 34, wherein the elastic inner layer is elastic in
both a longitudinal direction and a lateral direction of the disposable absorbent garment.
44. (original) The disposable absorbent garment of claim 34, wherein the elastic inner layer is
liquid impermeable.
45. The disposable absorbent garment of claim 34, wherein the elastic inner layer includes
two or more layers of materials.
48. The disposable absorbent garment of claim 34, wherein the disposable absorbent
garment has a longitudinal direction wherein the outer layer has a length in the longitudinal
direction, the elastic inner layer has a length in the longitudinal direction and the outer layer
length is greater than the elastic inner layer length.

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49. The disposable absorbent garment of claim 34, wherein the disposable absorbent garment has a lateral direction wherein the outer layer has a width in the lateral direction, the elastic inner layer has a width in the lateral direction and the outer layer width is greater than the elastic inner layer width.

50. The disposable absorbent garment of claim 34, wherein the disposable absorbent garment has a longitudinal direction, a lateral direction and a longitudinal side edge that includes a perimeter bonded area where the elastic inner layer is bonded to the outer layer, wherein the perimeter bonded area has a percentage of bonded area to unbonded area of from 10 to 40.

51. The disposable absorbent garment of claim 34, wherein the disposable absorbent garment has a longitudinal direction and a lateral direction and wherein the absorbent assembly is attached to the outer layer along a lateral centerline of the absorbent assembly.

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Evidence Appendix

[NONE]

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Related Proceedings Appendix
[NONE]
